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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. DANIEL LEE ALANDER, Defendant and Appellant.	A135430 (Solano County Super. Ct. No. FCR289721)

Defendant Daniel Lee Alander was convicted of evading a police officer and driving under the influence after a high-speed chase through a residential neighborhood. He contends the trial court improperly admitted police officer testimony about an interview with a vehicle passenger and committed various instructional errors. He also contends the presumption in Vehicle Code section 2800.2, subdivision (b) is unconstitutional and he should have been ordered to serve his sentence in county jail, rather than state prison. We affirm.

I. BACKGROUND

Defendant was charged in an information with evading a police officer (Veh. Code, § 2800.2, subd. (a)), driving under the influence (Veh. Code, § 23152, subd. (a)), hit-and-run driving (Veh. Code, § 20002, subd. (a)), and driving with a suspended license as a result of a prior conviction for driving under the influence (Veh. Code, § 14601.2, subd. (a)). It was alleged, as to the charge of evading an officer, that defendant drove with a willful disregard for the safety of persons and property (Veh. Code, § 2800.2, subds. (a) & (b)), and, as to the charge of driving under the influence, that defendant had

suffered a prior conviction for driving under the influence (Veh. Code, §§ 23152, subd. (b), 23540, 23546). The hit-and-run charge was eventually dismissed at the request of the prosecution.

The primary issue at trial was identity. A police officer testified he saw an SUV speed from a commercial area into a residential neighborhood and chased it in a marked patrol car with lights flashing and siren blaring. The driver sped up for a few blocks, running a stop sign and red light, before jumping a curb, striking a car parked in a driveway, and coming to a stop. When the officer and his partner drove up, they found a woman sitting in the street and spotted defendant near the car. The officers shined a spotlight on him briefly before he ran away. After a search, the police found defendant hiding nearby in a trash bin, where he claimed to be sleeping. He smelled of alcohol, slurred his speech, and later was found to have a blood-alcohol level of 0.09 percent.

The woman in the street, later identified as C.C., told an officer that defendant had been driving the SUV while intoxicated. She said she told defendant to stop the vehicle when she saw the police vehicle lights, but he accelerated instead. Just before the accident, defendant slowed the car and told her to jump out. As C.C. jumped, she caught her heel and fell into the street. The officer did not find C.C. to exhibit signs of excessive intoxication, such as trouble standing, slurred speech, or bloodshot eyes.

Called to testify, C.C. said she and defendant were on a date on the evening of his arrest. She became so intoxicated she could not recall leaving the bar, riding in the car, or even looking to see who was driving. When the driver stopped the car at her request to permit her to vomit, she fell into the street. C.C. denied recalling anything about her interview with the officer, although she did remember that an officer drove her home. Following this testimony, C.C. acknowledged that during phone calls with defendant from jail they had made comments vaguely alluding to his driving that night, and she had said she loved him. Over defense objection, the police officer who had interviewed C.C. was permitted to recount the interview.

The jury found defendant guilty of all charges, including evading a police officer with a willful disregard for safety, and the court found true the prior conviction and

prison commitment allegations. Defendant was sentenced to state prison for a term of three years.

II. DISCUSSION

Defendant contends (1) the trial court erred in admitting the officer's account of C.C.'s on-scene interview; (2) the presumption in Vehicle Code section 2800.2, subdivision (b) that the occurrence of either three one-point traffic violations or property damage constitutes willful and wanton disregard is unconstitutional; (3) the court erred in failing to instruct on the elements of the traffic violations and to give a unanimity instruction; (4) the instructions on circumstantial evidence and intent were inconsistent and confusing; and (5) the trial court erred in requiring him to serve his sentence in state prison.

A. *C.C.'s Police Interview*

Defendant contends C.C.'s statements to police were improperly admitted.

" ' "A statement by a witness that is inconsistent with his or her trial testimony is admissible to establish the truth of the matter asserted in the statement under the conditions set forth in Evidence Code sections 1235 and 770." [Citation.] . . . " 'Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness'[s] prior statement . . . .' " [Citation.]' [Citation.] Thus, for example, ' "[w]hen a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied. [Citation.] As long as there is a reasonable basis in the record for concluding that the witness's 'I don't remember' statements are evasive and untruthful, admission of his or her prior statements is proper." ' " (*People v. Homick* (2012) 55 Cal.4th 816, 859, fn. omitted.) We review the trial court's decision to admit a prior inconsistent statement for abuse of discretion. (*Ibid.*)

We find no abuse of discretion in the trial court's implicit conclusion there was a reasonable basis to conclude C.C. was being deliberately evasive in claiming not to remember the drive. First, her claimed lack of memory regarding the identity of the driver was implausible on its face. Although C.C. acknowledged recalling defendant drove her to a bar on a date that night, she claimed she was too drunk to remember

whether it was he who drove her home. Yet despite her claimed intoxication, she affirmatively and selectively recalled that she asked the driver to stop to permit her to vomit and never looked over to see who was driving. Given the driver's maneuvers that night, it is unlikely C.C. would not have glanced over to check his or her identity. Second, the officer who interviewed C.C. said she displayed no evidence of the excessive intoxication she claimed in her testimony. Third, the conspiratorial calls between defendant and C.C. from prison suggested C.C. did recall what happened that night, including that defendant was driving. Finally, those calls also indicated C.C. believed the two had a romantic relationship, giving her a motive to prevaricate.

Defendant notes the trial court made no finding of evasion, but an explicit finding was unnecessary. "A ruling on the admissibility of evidence implies whatever finding of fact is prerequisite thereto; a separate or formal finding is unnecessary unless required by statute." (Evid. Code, § 402, subd. (c); see *People v. Ledesma* (2006) 39 Cal.4th 641, 710.)

B. *Constitutionality of Vehicle Code Section 2800.2*

Subdivision (b) of Vehicle Code section 2800.2 states: "For purposes of this section, a willful or wanton disregard for the safety of persons or property includes, but is not limited to, driving while fleeing or attempting to elude a pursuing peace officer during which time either three or more violations that are assigned a traffic violation point count under Section 12810 occur, or damage to property occurs." Defendant contends the definition of "willful or wanton disregard" as including three or more traffic violations or the occurrence of property damage in section 2800.2, subdivision (b) constitutes an unconstitutional mandatory presumption.

Defendant's argument has been rejected in at least six published decisions issued between 2003 and 2006, and there have been no differing decisions published since then.[1]

[1] See *People v. Mutuma* (2006) 144 Cal.App.4th 635, 641; *People v. Laughlin* (2006) 137 Cal.App.4th 1020, 1027–1028; *People v. Burroughs* (2005) 131 Cal.App.4th 1401, 1407; *People v. Williams* (2005) 130 Cal.App.4th 1440, 1446; *People v. Diaz*

The now long-standing consensus of the Courts of Appeal is that defendant's argument is without merit, and we find no reason to disagree with that consensus.

C. *Vehicle Code Section 2800.2 Instructions*

The trial court delivered a modified version of CALCRIM No. 2181, which defines "willful or wanton disregard" in a manner consistent with Vehicle Code section 2800.2, subdivision (b), inserting the following: "Driving under the influence of alcohol, speeding, failing to stop at a stop sign and failing to stop at a red light are each assigned a traffic violation point." Defendant contends the trial court erred in failing to instruct on the elements of these traffic violations.

After receiving the prosecution's proposed jury instructions, defendant filed a request for additional jury instructions, but the request did not include the instruction he now contends was mandatory. Because the purported errors do not amount to structural error, he forfeited this argument by failing either to object to the lack of an instruction on these elements or to request such instruction. (*People v. Dunkle* (2005) 36 Cal.4th 861, 897, disapproved on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421 & fn. 22.)

Even if the claim of error had been properly preserved, we would decline to address the merits of defendant's argument because any error was clearly harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).) One of the traffic violations included in Vehicle Code section 2800.2, subdivision (b) is driving under the influence of alcohol. Because this was a charged offense, the jury was instructed on its elements and found defendant guilty. As to the others, of which only two were required, the officer's testimony was unequivocal and undisputed that defendant reached speeds far in excess of posted speed limits and failed to stop at a stop sign and a red traffic signal. There was no room for doubt that defendant satisfied the statutory criteria.

(2005) 125 Cal.App.4th 1484, 1487; *People v. Pinkston* (2003) 112 Cal.App.4th 387, 392–393.

Further, an alternative ground for finding a willful or wanton disregard for safety is the occurrence of damage to property. The evidence was clear defendant crashed his car into another car, effectively mooting the issue of the traffic violations. Defendant does not even attempt to argue the jury might have reached a different conclusion on the issue of "willful or wanton disregard" if the additional instructions had been given.[2]

The same reasoning requires rejection of defendant's argument the trial court should have delivered a unanimity instruction with respect to the Vehicle Code violations on which the jury's finding of willful or wanton disregard could have been based. The argument was forfeited when defendant failed to raise it below, and the abundant and undisputed evidence both of violations and property damage rendered any error harmless.

D. *Circumstantial Evidence and Intent Instructions*

Defendant also contends the trial court's instructions on circumstantial evidence and intent were inconsistent and confusing in various ways.

As with defendant's claims regarding the Vehicle Code section 2800.2 instructions, these issues were not raised in the trial court, when the purported inconsistencies and confusion could have been addressed by the trial court. Because the purported errors do not amount to structural error, the argument was forfeited. (*People v. Dunkle*, *supra*, 36 Cal.4th at p. 897.)

Again, as with defendant's claims regarding the Vehicle Code section 2800.2 instructions, any error was unquestionably harmless. As noted above, the only real issue at trial was defendant's identity, an issue only marginally affected by the claimed confusion and inconsistency in the circumstantial evidence and intent instructions. As discussed above, the evidence supporting the elements of the crimes of which he was

[2] Defendant does argue that prejudice must be measured by the constitutional standard of *Chapman v. California* (1967) 386 U.S. 18. While we believe the *Watson* standard is appropriate, we have no hesitation in holding that the failure to instruct on the elements of the traffic violations was harmless beyond a reasonable doubt.

convicted was clear and undisputed and could have led the jury to only one conclusion. Defendant makes no serious argument that he was prejudiced by the purported errors.[3]

E. *Defendant's Prison Sentence*

Defendant contends that, as a result of changes in sentencing introduced by the 2011 Realignment Legislation (Stats. 2011, ch. 15, § 1 et seq.) (Realignment Act), he should have been sentenced to serve his term in county jail rather than state prison.

"The Realignment Act replaced 'prison commitments with county jail commitments for certain felonies and eligible defendants.' [Citation.] It realigns ' "low-level felony offenders who do not have prior convictions for serious, violent, or sex offenses to locally run community-based corrections programs." ' [Citation.] Pursuant to [Penal Code] section 1170, subdivision (h)(6), the 'sentencing changes made by the [Realignment Act] . . . shall be applied prospectively to any person sentenced on or after October 1, 2011.' " (*People v. Gipson* (2013) 213 Cal.App.4th 1523, 1528.)

"When engaging in statutory construction, '[w]e begin with the statutory language because it is generally the most reliable indication of legislative intent. [Citation.] If the statutory language is unambiguous, we presume the Legislature meant what it said, and the plain meaning of the statute controls. [Citation.]' [Citation.] If the language is susceptible of multiple interpretations, 'the court looks "to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." [Citation.] After considering these extrinsic aids, we "must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." ' " (*Lopez v. Superior Court* (2010) 50 Cal.4th 1055, 1063, disapproved on other grounds in *People v. Harrison* (2013) 57 Cal.4th 1211, 1230 & fn. 2.)

[3] For the same reason, we find no prejudicial cumulative error.

The primary statute implementing the changes instituted by the Realignment Act is Penal Code section 1170, subdivision (h), which, as relevant here, holds that, except as specified in subdivision (h)(3), "a felony punishable *pursuant to this subdivision* where the term is not specified in the underlying offense shall be punishable by a term of imprisonment in a county jail for 16 months, or two or three years." (Penal Code, subd. (h)(1), italics added.)[4] It is undisputed that none of the exceptions specified in subdivision (h)(3) is relevant here.

Defendant was sentenced under Vehicle Code section 2800.2, which states a violator "shall be punished by imprisonment in the state prison, or by confinement in the county jail for not less than six months nor more than one year." (*Id.*, subd. (a).) Because section 2800.2 makes no reference to Penal Code section 1170, it is not a felony "punishable pursuant to [Penal Code section 1170, subdivision (h)]," as required to trigger the alternate sentencing provisions of the Realignment Act. Further, its plain language permits a state prison sentence, in addition to a commitment to county jail.

In arguing for the application of the Realignment Act alternative, defendant cites Vehicle Code section 42000, which states: "Unless a different penalty is expressly provided by this code, every person convicted of a felony for a violation of any provision of this code shall be punished by a fine of not less than one thousand dollars ($1,000) or more than ten thousand dollars ($10,000), or by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code, or by both such fine and imprisonment."

While Vehicle Code section 42000 appears to make all felony violations of the Vehicle Code subject to realignment, its initial phrase exempts those provisions of the code that "expressly provide[]" a different penalty. As noted above, section 2800.2 specifies punishment in state prison, rather than the alternative penalty provided under realignment. In *People v. Guillen* (2013) 212 Cal.App.4th 992 (*Guillen*), the court held that the same language in a different section of the Vehicle Code constituted the express

[4] Subdivision (h)(2) of Penal Code section 1170 requires punishment for felonies subject to specified terms also to be served in county jail, again with the exceptions in subdivision (h)(3).

provision of a " 'different penalty,' " thereby exempting the section from the general language of section 42000. (*Guillen*, at pp. 995–996.)

Any ambiguity in Vehicle Code section 42000 is resolved by an examination of the legislative history of the Realignment Act, which confirms that the *Guillen* rationale achieves the result intended by the Legislature. The Realignment Act consists of 639 separate sections. (Stats. 2011, ch. 15, §§ 1–639.) Most of these make the identical amendment to individual criminal statutes from a wide range of codes: deleting a reference to imprisonment "in the state prison" and substituting imprisonment "pursuant to subdivision (h) of Section 1170 of the Penal Code." In other words, where the Legislature intended that a criminal violation would be subject to the realignment alternative, it amended the governing statute by inserting an express reference to sentencing under Penal Code section 1170. Among the laws to which this change was made were 15 separate sections of the Vehicle Code, including section 42000. (Stats. 2011, ch. 15, §§ 600–615.) Vehicle Code section 2800.2 was not among the amended Vehicle Code provisions, suggesting the Legislature did not intend sentencing under that statute to be subject to Penal Code section 1170.

Further confirming the Legislature's intent is its treatment of Vehicle Code section 2800.4, which prohibits evading a police officer by driving in the wrong direction on a highway. Prior to realignment, section 2800.4 required punishment "by imprisonment for not less than six months nor more than one year in a county jail or by imprisonment in the state prison." (Veh. Code., former § 2800.4.) The Realignment Act amended that language to read: "by imprisonment for not less than six months nor more than one year in a county jail or by imprisonment *pursuant to subdivision (h) of Section 1170 of the Penal Code*." (Stats. 2011, ch. 15, § 599, p. 600, italics added; see Historical and Statutory Notes, 65B West's Ann. Veh. Code (2013 supp.) foll. § 2800.4, p. 145.) Given the similarity between the crimes specified in Vehicle Code sections 2800.2 and 2800.4, it stands to reason the Legislature would have amended section 2800.2 in the same manner if it intended section 2800.2 to be subject to realignment.

Demonstrating the Realignment Act's amendment of Vehicle Code section 2800.4 was not done casually, in 2012 the Legislature amended section 2800.4 again to restore the prison sentence penalty, thereby unequivocally signaling its present intent that a violation of section 2800.4 is to be punished by a sentence served in prison. (Stats. 2012, ch. 43, § 111, p. 2043.) Because the penalty language of section 2800.2 is materially the same as the current language of section 2800.4, there can be no doubt section 2800.2 is intended to be punished in the same way.

III. DISPOSITION

The judgment of the trial court is affirmed.

_____
Margulies, Acting P.J.

We concur:

_____
Banke, J.

_____
Sepulveda, J.[*]

[*] Retired Associate Justice of the Court of Appeal, First Appellate District assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.